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Supreme Court U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1998

JOSEPH NICHOLSON,

Petitioner,

v.

THE COMMONWEALTH OF KENTUCKY

and

ROBERT A. BIRD,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Assessment of and Payment by Petitioner, Joseph Nicholson, of the Kentucky Control Substance Excise Tax Bars Subsequent Criminal Prosecution for Possession or Trafficking in the Controlled Substance on Federal Constitutional Double Jeopardy Grounds.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Cited Authorities ..... iii-v

Statement of Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 2-4

Reasons for Granting the Writ 5

A. The Kentucky Supreme Court has Rendered a Decision in Conflict with the Decision of the United States Supreme Court and Decisions of Other State Courts of Last Resort 5-6

1. The Threshold Factors of *Kurth Ranch* are Found in the CST 6-9

2. The Kentucky CST Meets the *Unusual Features* Test of *Kurth Ranch* and is Punishment for the Purposes of Double Jeopardy Analysis 9-17

Conclusion 17

TABLE OF CITED AUTHORITIES

Cases Cited:

Brown v. Ohio,
432 U.S. 161, 167-168, 97 S.Ct. 2221, 2226,
53 L.Ed.2d 187 (1987) ..... 13 [FN3]

Bryan v. Indiana,
660 N.E.2d 290 (Ind. 1995) 16

Commissioner of Revenue v. Mullins,
702 N.E.2d. 1, 8n 14 (Mass. 1998) 7, 8, 11, 13, 14, 15

Commonwealth of Kentucky v. Bird,
Ky., 979 S.W.2d 915 (1998) 1

Desimone v. Nevada,
904 P.2d 1, 4 (Nev. 1995) 9, 16, 17

Jackson v. Commonwealth,
Ky., 633 S.W.2d 61, 62 (1982) ..... 13 [FN3]

Montana Dept. of Revenue v. Kurth Ranch,
511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) .. 2, 4-7, 9-17

New Mexico Taxation and Revenue Dept. v. Whitener,
869 P.2d 829 (N.M. App. 1993) 16

United States v. Sanchez,
340 U.S. 42, 71 S.Ct. 108, 95 L. Ed. 47 (1950) 7

Ward v. Texas,
915 S.W.2d 941, 946 (Tex. App. 1996, pet. filed) 9, 16

Wilson v. Department of Revenue,
662 N.E.2d 415 (Ill. 1996) 11, 12, 16

Federal Statutes Cited:

28 U.S.C. § 1257(a) 2

State Statutes Cited:

KRS 138.870 ..... 3, 5, 10, 14

KRS 138.872 ..... 3, 6, 10

KRS 138.878 14

KRS 138.889 3

KRS 218A.1412 3

KRS 434.030 3

KRS 532.010 3

United States Constitution Cited:

Fifth Amendment
to the United States Constitution 2, 5, 6, 9, 16, 17

Appendices:

APPENDIX A 1, 3, 7, 13

APPENDIX B 1, 3, 8

APPENDIX C 1, 2, 4, 8

APPENDIX D 3

APPENDIX E 3, 6, 10, 14

APPENDIX F 3

APPENDICES

APPENDIX A — Judgment Sought to be Reviewed, Commonwealth of Kentucky Supreme Court, Opinion of the Court by Justice Stephens entered November 19, 1998 ..... A-1

APPENDIX B — Commonwealth of Kentucky Court of Appeals, Opinion entered August 15, 1997 ..... B-1

APPENDIX C — Fayette Circuit Court, Opinion entered February 23, 1996 ..... C-1

APPENDIX D — KRS 218A.1412 ..... D-1

APPENDIX E — KRS 138.870, KRS 138.872, and KRS 138.889 ..... E-1

APPENDIX F — KRS 434.030 and KRS 532.010 ..... F-1

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OPINIONS BELOW

The Opinion of the Kentucky Supreme Court (APPENDIX A, *infra*, pp. A 1-5) is reported as *Commonwealth of Kentucky v. Bird*, Ky., 979 S.W.2d 915 (1998). The Opinions of the Kentucky Court of Appeals (APPENDIX B, *infra*, pp. B 1-3) and the Fayette Circuit Court (APPENDIX C, *infra*, pp. C 1-2) are unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Kentucky Opinion was decided on November 19, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides, in part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." See, *Montana Dept. of Revenue v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

STATEMENT OF THE CASE

The question was timely raised at the trial court on Petitioner's Motion to Dismiss in the Fayette Circuit Court. In its Opinion and Order filed and entered February 23, 1996 the Court held:

> This matter is before the Court on the Defendant's Motion to Dismiss on the grounds that they [Nicholson and Co-Defendant Bird] were previously assessed and therefore paid a tax for the controlled substances on which Count 1 of the within indictment is based and the prosecution under Count 1, therefore constitutes a violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution. We agree and sustain the Defendant's motions.

Opinion and Order, APPENDIX C, *infra*, at C-1.

This question was timely raised on appeal to the Commonwealth of Kentucky Court of Appeals, Number 96-CA-0666-MR, by the Commonwealth of Kentucky and Petitioner. In the Court's Opinion, August 15, 1997, the Court affirmed the Fayette Circuit Court dismissal of Count 1 of the indictment:

> We believe the case sub judice sufficiently similar to Kurth Ranch to warrant reliance thereupon and, as such, are of the opinion that the Circuit Court did not commit reversible error by dismissing Count 1 of the indictment against Bird and Nicholson.

Opinion of the Court of Appeals, APPENDIX B, *infra*, at B-2.

This question was timely raised by the Commonwealth of Kentucky's appeal to the Supreme Court of Kentucky which in its November 19, 1998 opinion reversed the lower courts:

> At issue is whether a criminal defendant's payment of the Kentucky Controlled Substance Excise Tax ("Drug Tax"), KRS 138.870-.990, bars subsequent criminal prosecution on federal and Kentucky double jeopardy grounds. We find that it does not.

Opinion, APPENDIX A, *infra*, at A-1.

On July 21, 1995, Petitioner Joseph Nicholson was arrested for trafficking in a controlled substance in the first degree in violation of Kentucky law, KRS 218A.1412 (APPENDIX D, *infra*). Seized in the arrest were 9.8 grams of a controlled substance, powder cocaine. On August 8, 1995, the Commonwealth of Kentucky Revenue Cabinet assessed Petitioner $4,200.00, plus a penalty of $4,200.00 and interest of $32.22 for a total assessment of $8,432.22. The assessment was based on Kentucky's Controlled Substance Excise Tax ("CST"), KRS 138.870, 138.872 and 138.889 (APPENDIX E, *infra*) for possession of 20.4 grams of cocaine. Upon notification of the recalculated amount of cocaine (9.8 grams), the Revenue Cabinet revised the tax due to $2,000 and plus a penalty of $2,000 and interest of $72.49 which Nicholson paid based upon the tax of $200.00 per gram, and a penalty of $200.00 per gram.

The CST also provides in KRS 138.889(2)(a) (APPENDIX E, *infra*) that a dealer who fails to affix the Controlled Substance Stamp also is guilty of a Class C felony. KRS 434.030 and KRS 532.010 (APPENDIX F, *infra*) provide that a person convicted of a

Class C felony shall be subject to imprisonment for at least five (5) but not more than ten (10) years and a fine of not less than $1,000.00 and not greater than $10,000.00, or double his gain from commission of the offense, whichever is greater.

On November 27, 1995, Nicholson and Co-Defendant, Robert A. Bird, were indicted by the Grand Jury and each were charged with one count of trafficking in a controlled substance in the first degree, a Class C felony. Nicholson and Bird moved for dismissal of the charges based on federal and state double jeopardy grounds on authority of *Montana Dept. of Revenue. v. Kurth Ranch*, 114 S. Ct. 1937 (1994). (R 16, 18, Supp. Transcript, page 6). Following an evidentiary hearing, the Fayette Circuit Court dismissed the counts of trafficking in a controlled substance by a written opinion dated February 23, 1996. APPENDIX C, *infra*.

During the hearing on Nicholson's Motion to Dismiss, Jackie Taylor, the Unit Supervisor from the Revenue Cabinet and the Director of CST unit, testified that legal possession of a controlled substance is not taxable and, although hundreds of notices of assessments under the CST have been made by her unit, she could not remember one case which did not start as a result of a criminal prosecution by a law enforcement agency. (Tape 1; 1/12/96; 17:50:15). There is no evidence of anyone paying the CST before being arrested. She testified receiving notice from the police within 72 hours of Nicholson's arrest and immediately made the assessment as required by the CST statute. (Tape 1; 17:30:53). The arresting officer, Sgt. Greg Jennings, testified that the street value of the controlled substance seized was $100.00 per gram. (Tape 1; 17:56:10). The legislative history, hereinafter addressed, was also introduced.

The Court of Appeals of the Commonwealth of Kentucky affirmed the opinion of the Fayette Circuit Court on August 15, 1997, but the Supreme Court of Kentucky reversed the decision on November 19, 1998. This Petition seeks reversal of that decision.

REASONS FOR GRANTING THE WRIT

A. The Kentucky Supreme Court has Rendered a Decision in Conflict with the Decision of the United States Supreme Court and Decisions of Other State Courts of Last Resort

The United States Supreme Court's decision in *Kurth Ranch*, 511 U.S. 767, determined that the Montana Department of Revenue in assessing a tax on illegal possession of drugs pursuant to a tax similar to the Kentucky CST after the state has imposed a criminal punishment for the same conduct constituted double jeopardy in violation of the Fifth Amendment of the Constitution of the United States. The Supreme Court of the Commonwealth of Kentucky, the subject of this Petition, decided the same question in conflict with the *Kurth Ranch* decision. The Kentucky Court's decision also conflicts with decisions of several state courts including Colorado, Illinois, Indiana, Nevada, Texas, Utah and Massachusetts which find their drug taxes to be punitive and a functional equivalent of criminal punishment for double jeopardy purposes. Other state courts, including Iowa, Kansas, Nebraska, North Carolina and South Carolina, distinguish their respective drug tax from the Montana drug tax discussed in *Kurth Ranch*. The *Kurth Ranch* decision has been either followed, distinguished, explained, limited or questioned in the majority of the federal circuit courts and the highest court in virtually every state. State courts with almost identical CST statutes reach different results on the issue. Only this Court has authority to resolve these conflicting decisions on this important constitutional question and Petitioner requests it do so for the reasons set forth herein.

In *Kurth Ranch*, the United States Supreme Court ruled clearly and unequivocally that a nearly identical tax on controlled substances to the Kentucky Controlled Substances Tax ("CST") is a punishment for purposes of Double Jeopardy analysis. The Montana Dangerous Drug Tax Act held to violate double jeopardy in *Kurth Ranch*, Mont. Code Ann. §§ 15-25-101—15-25-123 (1987), does not vary in substance from the CST, KRS 138.870 *et seq.* When the holding in *Kurth Ranch* is applied to the Kentucky CST, this Court should find that the CST does constitute punishment for Double Jeopardy

purposes and the subsequent attempt to punish the Petitioner for the same offense is in violation of his Fifth Amendment rights.

The following is an analysis of the application of the *Kurth Ranch* decision to this case:

1. The Threshold Factors of *Kurth Ranch* are Found in the CST

The Supreme Court has identified several factors which indicate when the "penalizing features" of a so-called tax are such that it loses its identity as a tax and becomes a "mere penalty" subject to the constraints of the Double Jeopardy Clause. Thus, the mere labeling of a regulation as a tax does not give it automatic immunity from Double Jeopardy's scrutiny. *Kurth Ranch*, 114 S. Ct. at 1946.

In *Kurth Ranch* the Court identified two factors which, although not dispositive proof of a tax's punitive nature, do "lend support to the characterization of the drug tax as punishment." *Kurth Ranch*, 114 S. Ct. at 1947. Those factors are (1) the tax be imposed at a very high rate and (2) the purpose of the tax be to deter drug use or sale.

The CST provides that the assessment applied to Nicholson is $400.00 per gram of controlled substance, more than four times the value of the cocaine, $100.00 per gram. KRS 138.872 (1)(c) and 138.889(1) - APPENDIX E, *infra*. It should be emphasized that this tax rate is also exactly the same rate per gram of controlled substance (e.g. powder cocaine) charged in *Kurth Ranch* by Montana in its Dangerous Drug Tax Act which was held to be sufficiently punitive to violate double jeopardy[1] and the failure to pay the tax is a felony with additional punishment.[2]

The imposition of the Kentucky CST also distinguishes it from traditional income taxes on illegal activities. A taxpayer who

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Kurth Ranch, 114 S.Ct. at 1951 n2, states: "The state thus taxed the drugs at about 400% of their market value."

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Violation of the CST is a Class C felony with penalties of 5 to 10 years in prison, a fine of $1,000.00 to $10,000.00, or double the gain from the offense, whichever is greater. KRS 434.030. APPENDIX F, *infra*.

fails to pay income tax on income from illegal activities is treated the same as a person who fails to pay tax on income from legal activities. The taxpayer is not taxed merely because of his illegal activity, as the case with the CST. See *Commissioner of Revenue v. Mullins*, 702 N.E.2d. 1, 8n 14 (Mass. 1998).

In Nicholson's case, the Kentucky Supreme Court stated:

> The United States Supreme Court has permitted much higher taxes to withstand constitutional scrutiny. See, e.g., United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108, 95 L. Ed. 47 (1950) (sustaining the $100-per-ounce federal tax on marijuana) (cited in Kurth Ranch, 511 U.S. at 781, 114 S.Ct. at 1947, 128 L.Ed.2d at 779). Moreover, Kentucky law permits any harmful activity "to be taxed so high as to prohibit its being carried on except at a financial loss[,] thus taxing it out of business." Peel v. Dummit, Ky., 214 S.W.2d 605, 607 (1948).

Opinion, APPENDIX A, *infra*, at A-4.

The Court's reasoning is flawed and *Sanchez*, Id., is not relevant to the Kentucky CST because: (1) *Sanchez* did not involve the double jeopardy issue; (2) *Kurth Ranch* distinguished *Sanchez* when it specifically held the high rate of tax was punishment for double jeopardy purpose; and (3) Petitioner has not contested the validity of the CST, only the ability of the Commonwealth to subsequently criminally prosecute Nicholson and those who have paid the CST.

In *Commissioner of Revenue v. Mullins*, 702 N.E.2d 1 (Mass 1998), the Massachusetts Supreme Court in a decision the same date as the decision in this case, unanimously found that the Massachusetts CST tax on dealers met all of the *Kurth Ranch* criteria. The Massachusetts CST is on dealers and is identical to the Kentucky CST tax in all relevant respects, including the rate. The court concluded:

> The CST imposes a high rate of taxation and a deterrent purpose is evident . . . and cannot be persuasively controverted by the Commissioner. [FN] 8. It is the presence in G.L.c. 64K [the Massachusetts CST] of the third and fourth Kurth Ranch factors that provide the "clearest

> proof" that the sanction imposed under the statute is intended to be punitive. See Hudson v. United States, *supra*, at ____, 118 S.Ct. at 493.

Mullins, 702 N.E.2d. at 6.

Similarly, the Kentucky Court of Appeals in Nicholson's case found the CST to be punitive and was intended for punishment.

> No reasonable argument can be made that the Controlled Substance Excise Tax is promulgated to attain revenue for the state; rather, its obvious purpose is to eliminate the proliferation of controlled substances. When the Commonwealth chooses to exact a heavy tax intended to restrict or abolish or illegal or what it deems undesirable substances, the assessment is penal in nature and falls within the ambit of the double jeopardy clauses of the State and Federal Constitutions. The Commonwealth is then compelled to act accordingly. It cannot impose double punishment for "a single course of conduct." See Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and Jones v. Commonwealth, Ky., 756 S.W.2d 463 (1988); and KRS 505.020.

Opinion, APPENDIX B, *infra*, at B-2.

The legislative history of the Kentucky CST makes it clear that the legislature intended this tax to punish persons for crimes rather than to serve a revenue producing purpose. In the Kentucky Legislative House Committee on Appropriations and Revenue meeting held on March 1, 1994, Representatives Charles Geveden and Stan Cave, the sponsors of the bill which became the Kentucky CST, proclaimed the intent behind the statute was "to take the profit out of drug trafficking." Minutes of the House Committee on Appropriations and Revenue, 1994 Regular Session, Meeting #8, March 1, 1994, House Bill 171, APPENDIX C, *infra*, pp. C-2. This statement is nearly identical to one made by one of the sponsors of the Nevada bill which eventually became their version of Kentucky's CST and was held to be punitive in *Desimone v.*

Nevada, 904 P.2d 1, 4 (Nev. 1995). *Desimone* stated that the sponsor of the Nevada bill explained that one purpose of the bill was to "get the drug dealers where it really hurts - in the pocketbook." Id., 904 P.2d at 5. Thus, given the intent of the General Assembly in enacting the Kentucky CST and in view of the *Kurth Ranch* decision, it is a violation of Nicholson's Fifth Amendment protection from Double Jeopardy to impose criminal sanctions after imposing this punitive tax sanction against him. As *Kurth Ranch* makes clear, the crucial inquiry whether jeopardy attaches to tax statutes probes the stated intentions.

Unlike Kentucky, there was no legislative history of the Montana tax to assist the Court in determining whether its purpose was to punish, so the court in *Kurth Ranch*, 114 S.Ct. at 1947, looked to other exceptional conditions which set the statute apart from most taxes. It is through the additional analysis, hereafter discussed, that the court was able to discern the imposition of the Montana tax departed so far from normal revenue laws as to become a form of punishment. The court in the instant case did not need to apply the other *unusual features* test of *Kurth Ranch* as the legislative history clearly indicated the legislature's intent that the tax was to serve as punishment. See, Ex Parte *Ward*, 964 S.W.2d. 617, 622 (Tex.Crim.App. 1998). No other evidence of the punitive intent or excessive nature of the tax was required when measured against *Kurth Ranch*.

2. The Kentucky CST Meets the *Unusual Features* Test of *Kurth Ranch* and is Punishment for the Purposes of Double Jeopardy Analysis.

The Supreme Court identified examples of two such *unusual features* in the Montana Dangerous Drug Tax which sufficiently set it apart from most other taxes to qualify as a punishment under Double Jeopardy analysis. The Court found that the first *unusual feature*, the "so-called tax is conditioned on the commission of a crime" is "significant of penal and prohibitory intent rather than the gathering of revenue." *Kurth Ranch*, 114 S. Ct. at 1947. Secondly, "[a] tax on "possession" of goods that no longer exist that the taxpayer never lawfully possessed has an unmistakenly punitive character. This tax imposed on criminals and no others departs so far

from normal revenue laws as to become a form of punishment." Id. at 1948. However, the Court noted that the mixed motive becomes a single motive when the "taxed activity is completely forbidden, for the legitimate revenue-raising purpose that may support such a tax could be equally well served by increasing the fine imposed upon conviction." Id. at 1947.

The Kentucky CST is likewise conditioned upon the commission of a crime as it punishes only dealers "engaged" in a taxable activity. KRS 138.870 (3). APPENDIX E, *infra*. A taxable activity is defined as "producing, cultivating, manufacturing, importing, transporting, distributing, acquiring, purchasing, storing, selling, using, or otherwise possessing more than . . . seven (7) grams of any controlled substance," all ordinarily illegal activities. KRS 138.870 (4). APPENDIX E, *infra*. The CST provides that a person "lawfully engaged in a taxable activity shall be exempt from the tax imposed by this section." KRS 138.872 (3). APPENDIX E, *infra*. Thus, the Kentucky CST punishes only dealers. A dealer is someone who intends to sell or distribute the product. The crime and the activity to which the CST is applied are so closely related as to constitute in substance an identical offense.

The Kentucky Supreme Court attempted to distinguish the Kentucky CST from the Montana statute in *Kurth Ranch* because the CST is not due upon arrest, but instead upon the occurrence of taxable activity, possession. Arrest, however, was not the key to the Court in *Kurth Ranch*. Arrest was merely an additional indicator that the tax was based upon commission of a crime. This Court stated that "the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested. . . ." *Kurth Ranch*, 114 S. Ct. at 1947 (emphasis added). Clearly arrest was not a factor in the Court's determination that the tax was based on the commission of a crime. As discussed above, the Kentucky CST is only imposed on illegal possession. The Kentucky CST, however, imposes the tax based upon the illegal activity of the person taxed, exactly in the same manner as the Montana statute considered in *Kurth Ranch*. As the Illinois Supreme Court stated in response to an identical argument concerning the validity of the Illinois Cannabis and Controlled Substances Tax Act which is similar to the Kentucky CST, to say that the tax is not based upon commission of a crime is to "over-

look the plain language of the statute." *Wilson v. Department of Revenue*, 662 N.E.2d 415, 419-20 (Ill. 1996). The Kentucky CST is very similar to the Illinois statute the *Wilson* court found to violate *Kurth Ranch*. "[B]y the terms of the Act, criminal conduct is a prerequisite to tax liability." Wilson, 662 N.E.2d at 420.

In *Commission of Revenue v. Mullins*, 702 N.E.2d. 1 (Mass. 1998), the Court considered the Massachusetts drug tax, identical to the Kentucky CST in all material respects, assessed against a dealer engaged in a taxable activity.

> The CST is clearly conditioned on the commission of a crime. While assessment of the CST does not specifically depend on arrest, criminal activity is required before the tax is imposed as the statute makes the tax exclusively applicable to illegal activity. In particular, only acquisitions or possession over threshold quantities 'in violation of Massachusetts laws' result in "dealer" status under the act, and thus subject the individual to the CST. G.L.c.64K, § 1. Moreover, lawful possession of marihuana *413 and controlled substances is outside the scope of taxability by operation of two statutory provisions: the definition of "dealer" in § 1, and the specific exclusion in § 6. This nexus between the CST and criminal conduct is emphasized by the provision precluding construction of the CST to give dealers immunity from prosecution, G.L.c. 64K, § 5.

Id. at 6.

There is no reasonable basis for courts to reach diametrically opposed results on similar CST laws. The compelling reason this Court should grant Petitioner's Writ is emphasized in *Mullins:*

> The commissioner relies on the decisions of other courts that have distinguished Kurth Ranch on the basis that the Montana statute specifically imposed the tax after the taxpayer was arrested for possession of the contraband, rather than "immediately upon . . .

possession" as provided in G.L. c. 64K, *414 § 11. See, e.g., Covelli v. Commissioner of Revenue Servs., 235 Conn. 539, 548-550, 668 A.2d 699 (1995), vacated and remanded, 518 U.S. 1031, 116 S.Ct. 2577, 135 L.Ed.2d 1092, aff'd. after remand, 239 Conn. 257, 683 A.2d 737 (1996), cert. denied, — U.S. —, 117 S.Ct. 1445, 137 L.Ed.2d 551 (1997); Milner v. State, 658 So.2d 500, 502 (Ala.Civ.App. 1994); State v. Lange, 531 N.W.2d 108, 116 (Iowa 1995); State v. Gulledge, 257 Kan. 915, 922, 896 P.2d 378 (1005); McMullin v. South Carolina Dep't of Revenue & Taxation, 321 S.C. 475, 469 S.E.2d 600 (1996). This attempt to distinguish Kurth Ranch is unpersuasive, and we agree with the broader interpretation given Kurth Ranch by those courts concluding that taxes similar to G.L. c. 64K are punitive, by relying on the express limitation of the tax to unlawful activity. See Lynn v. West, supra at 590-591; Wilson v. Department of Revenue, 169 Ill.2d 306, 314-**7 315, 214 Ill.Dec. 849, 662 N.E.2d 415 (1996); Bryant v. State, 660 N.E.2d 290, 294 (Ind. 1995) (same), cert. denied, — U.S. —, 117 S.Ct. 293, 136 L.Ed.2d 213 (1996). See also Desimone v. State, 111 Nev. 1221, 1225-1227, 904 P.2d 1 (1995), vacated and remanded, 518 U.S. 1030, 116 S.Ct. 2576, 135 L.Ed.2d 1091 (1996); [NV 12] Brunner v. Collection Div. of the Utah State Tax Comm'n, 945 P.2d 687, 690-691 (Utah 1997). In our view, the similarity between the two tax schemes is more compelling than the difference. Although G.L. c. 64K is predicated on a voluntary payment scheme, and does not limit assessment of the CST to a time after arrest, its enforcement is invariably limited to individuals who have been arrested for drug crimes. The only two assessments under the statute have followed reference to the department by law enforcement personnel subsequent to an arrest for illegal possession. No dealers have voluntarily paid the tax, nor does the commissioner otherwise enforce the statute. "The existence of the voluntary payment option is at best illusory and does not . . . make the post-arrest imposition of the Tax any less a penalty for double jeopardy purposes. People v. Maurello, 932 P.2d 851, 853 (Colo.App. 1997). [FN 13]

Id. at 7.

In Nicholson's case, the Kentucky Supreme Court said there is no identity of offenses between the Kentucky drug tax and the Kentucky Trafficking statute.

> Kentucky's Trafficking Statute has a scienter requirement and imposes liability for trafficking in any amount of a controlled substance. The drug tax, however, has no scienter requirement and is only levied if the taxpayer possesses at least 7 grams of a controlled substance or 50 dosage units. Therefore, one could be arrested and convicted of trafficking in a controlled substance yet not be assessed a drug tax.

Opinion, APPENDIX A, *infra*, p. A-5.

As discussed in *Mullins*, a dealer is obviously someone who intends to sell or distribute his product. Thus, the Kentucky CST punishes a person who possesses more than 7 grams of controlled substance and intends to sell or distribute it. This is precisely the crime to which Petitioner is charged.[3] That crime and activity to which the CST is applied are so closely related in fact as to constitute in substance an identical offense for purposes of double jeopardy. The Court in *Mullins* considered the exact issue raised in Nicholson's case by the Kentucky Supreme Court.

> In concluding that the CST and the crime of which the taxpayer was convicted are the functional equivalent of each other, we have considered and rejected the Commissioner's arguments that 'more than 40 grams' provision of the CST creates a distinct element which makes violation of the statute an independent crime.

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Possession is a lesser - included offense of trafficking, *Jackson v. Commonwealth*, Ky., 633 S.W.2d 61, 62 (1982), and punishment for a lesser - included offense precludes punishment for the greater offense on double jeopardy grounds. *Brown v. Ohio*, 432 U.S. 161, 167-168, 97 S.Ct. 2221, 2226, 53 L.Ed.2d 187 (1987).

> Our conclusion is dictated by the circumstances of this case. Because there was no dispute as to the quantity of marihuana that was found in the taxpayer's possession, the substantive facts supporting imposition of the CST are identical to those which the Commonwealth had to prove in the criminal matter, except for the additional factor of knowledge or intent in the criminal case that distinguishes the greater from the lesser offense.

Mullins, 702 N.E.2d. at 9 n16.

The Kentucky CST is exclusively applicable to illegal activities. Lawful possession of controlled substances is outside the scope of taxability by operation of the two statutory provisions: the definition of "dealer" and the exclusion for legal activity. Thus, the nexus between the CST and criminal conduct is emphasized in the provision precluding construction of the CST to give dealers immunity from prosecution set forth in KRS 138.878.[4]

The second "unusual feature" the Supreme Court found in *Kurth Ranch* was that the Montana drug tax was "levied on goods that the taxpayer neither owns nor possesses when the tax is imposed . . . . A tax on 'possession' of goods that . . . the taxpayer never lawfully possessed has an unmistakably punitive character." *Kurth Ranch*, 114 S. Ct. at 1948. Petitioner no longer possessed the goods which form the basis of the tax bill he received from the Revenue Cabinet. As in *Kurth Ranch*, the taxation of those goods which Petitioner could never have lawfully possessed is unmistakably punitive.

Also, the definition of a "taxable activity" in KRS 138.870(4) proves instructional on this point. Recalling that the Commonwealth defines a taxable activity as "producing, cultivating, . . . using, or otherwise possessing more than . . . seven (7) grams of any controlled substance." (emphasis added). APPENDIX E, *infra*. The wording

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KRS 138.878 provides:
Nothing in KRS 138.870 to 138.889 including payment of the tax, shall in any manner provide immunity for a dealer from criminal prosecution pursuant to Kentucky law.

of the statute therefore implies that all of the previously mentioned activities are tied to the act of possession of a controlled substance. If the person being taxed is no longer in possession of the substance which forms the basis of his tax liability then *Kurth Ranch* makes clear that the taxing statute is punitive for the purposes of Double Jeopardy analysis.

As Chief Justice Rehnquist wrote in the Kurth Ranch dissent, "Because the activity sought to be taxed is illegal, individuals cannot be expected to voluntarily identify themselves as subject to the tax." *Kurth Ranch*, 114 S.Ct. at 1951. On this issue, the Massachusetts Supreme Court held:

> Thus, as in Kurth Ranch, "the assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives *415 rise to the tax obligation in the first place." Kurth Ranch, *supra*, at 781, 114 S.Ct. 1937. "Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the [CST]." Id. at 781-782, 114 S.Ct. 1937. "The theoretical possibility that a drug dealer could voluntarily pay the [CST] does not take the tax out of the criminal penalty category. The unused statutory reporting and payment scheme, while clever, is not enough to distinguish Kurth Ranch. The [CST] is still based on a criminal act." Lynn v. West, *supra*, at 591.

Mullins, 702 N.E.2d. at 8.

The *unusual features* test identified in *Kurth Ranch* is not limited in its application by the two features identified in that particular case. Tax statutes may be punitive for the purposes of Double Jeopardy analysis without fitting exactly into the mold created by the *Kurth Ranch* decision. *See Kurth Ranch*, 114 S. Ct. at 1945-48. Instead:

> Kurth Ranch makes clear the crucial inquiry in determining whether jeopardy attaches to tax statutes probes the state's intentions. Kurth Ranch identified

> characteristics of the state's enactment and prosecution of the tax statute to test objectively if the state intended punishment whether actual punishment occurred in each individual case was not part of the inquiry.

Desimone v. Nevada, 904 P.2d 1, 4 (Nevada 1995).

In *Desimone*, Id., the Nevada Supreme Court, like several other state courts (*See New Mexico Taxation and Revenue Dept. v. Whitener*, 869 P.2d 829 (N.M. App. 1993) (following the *Kurth Ranch* decision as decided in the Ninth Circuit and eventually upheld by the Supreme Court); *Bryan v. Indiana*, 660 N.E.2d 290 (Ind. 1995) (holding that a similar drug tax to that found in Kentucky was a punishment for Double Jeopardy analysis purposes); *Ward v. Texas*, 915 S.W.2d 941, 946 (Tex. App. 1996, pet. filed) ("We find that a tax imposed under the Texas Controlled Substances Tax statue [similar to the Kentucky CST] is punishment for the purposes of double jeopardy considerations."); *Wilson v. Department of Revenue*, 662 N.E.2d 415, 419-20 (Ill. 1996) (discussed above)), ruled that the state is barred from imposing a tax and further pursuing a criminal prosecution under the *Kurth Ranch* decision. *Desimone*, 904 P.2d at 7, 8.

It should be noted that the *Desimone*, Id., court expressed "some apprehension" in deciding that the state's imposition of a punitive tax on a defendant before obtaining a criminal conviction prevents the state from seeking a criminal conviction against a given defendant. *Desimone*, 904 P.2d at 6. The court was reluctant to adopt such a rule. Nevertheless, it chose to uphold the Fifth Amendment as clearly dictated by the Supreme Court in *Kurth Ranch*. Justice Scalia in his dissent in the *Kurth Ranch* decision recognized that, under the rule adopted by the Court, the order of the criminal or civil punitive sanction is not important to Double Jeopardy analysis. *Kurth Ranch*, 114 S. Ct. at 1958-59. The court in *Ward v. Texas* agreed: "This case forces us to take on the difficult and disagreeable task described by Justice Scalia in his *Kurth Ranch* dissent—disallowing criminal punishment because a civil sanction has already been imposed. Yet *Kurth Ranch* permits no other result." *Ward*, 915 S.W.2d at 947 (citation omitted). It is clear that the Double Jeopardy Clause prohibits a criminal conviction

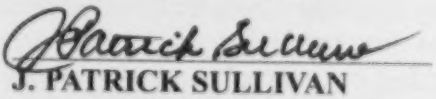
following the imposition of a punitive tax as defined in *Kurth Ranch*. The *Desimone* court further recognized that its decision would not be popular and that it would receive criticism from those who claim that not allowing a criminal sanction after a punitive tax has been imposed creates a "windfall for the defendant." The Court's response to this criticism was simple and direct. "If bare enforcement of our constitutional guarantees creates a windfall for our state's citizenry, then we shall all benefit." *Desimone*, 94 P.2d at 6 n.6 (emphasis added).

CONCLUSION

The *Kurth Ranch* test requires that Nicholson not be subjected to a criminal trial after being assessed a punitive tax by the same sovereign which is the functional equivalent of successive criminal prosecutions. This decision is mandated by this Court's holding in *Kurth Ranch* and simply upholds our Bill of Rights. The factors existing in this case present the clearest proof that this "tax" was intended to be a criminal penalty rather than a civil remedy and violates the double jeopardy provisions of the Fifth Amendment of the United States Constitution.

WHEREFORE, this Court should grant this Petition to reconcile the patent conflict of the ruling in this case and others with the decisions of this Court which are being functionally ignored or nullified. *Kurth Ranch* is the law of the United States and this Court has a duty to direct the judicial system in its application. For the reasons stated herein, Petitioner respectfully prays this Court will grant the Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

Opinion of the Supreme Court of Kentucky,
Rendered November 19, 1998.

Commonwealth of Kentucky, Appellant, v. Robert A. Bird
and Joseph Nicholson, Appellees.

CASE NO. 97-SC-714-DG

SUPREME COURT OF KENTUCKY

979 S.W.2d 915 (1998)

November 19, 1998, Decided.

OPINION OF THE COURT BY JUSTICE STEPHENS

REVERSING

At issue is whether a criminal defendant's payment of the Kentucky Controlled Substances Excise Tax (drug tax), KRS 138.870-.990, bars subsequent criminal prosecution on federal and Kentucky double jeopardy grounds. We find that it does not. Because we find no double jeopardy problem, we need not address Appellees Bird and Nicholson's assertion that imposition of the drug tax constitutes an exercise of absolute and arbitrary power under the Section 2 of the Kentucky Constitution.

In July 1995, the Lexington-Fayette Urban County Police Department arrested and charged Robert A. Bird and Joseph Nicholson with first-degree trafficking in a controlled substance. The police seized powder cocaine from them. Finding no drug tax stamp on the confiscated cocaine, the police filed a notice of seizure with the Kentucky Revenue Cabinet as required by KRS 138.880. The Revenue Cabinet then assessed Bird and Nicholson for nonpayment of their drug tax and penalties. Bird and Nicholson paid taxes of approximately $6,000.00 and $4,000.00 respectively, prior to indictment.

Thereafter, the Fayette Circuit Court dismissed the trafficking charges for violating constitutional prohibitions against double jeopardy, citing Department of Rev. of Montana v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994), the Fifth Amendment to the United States Constitution, and Section 13 of the Kentucky Constitution. The Court of Appeals later affirmed, concluding that this case was similar enough to Kurth Ranch to warrant a finding that assessment and payment of the Kentucky drug tax is penal in nature and bars subsequent criminal prosecution.

In Kurth Ranch, the United States Supreme Court found that imposition of Montana's drug tax constituted a bar to subsequent prosecution for purposes of double jeopardy. As summarized by the Kentucky Attorney General in its opinion analyzing the Kentucky drug tax:

> The Montana Dangerous Drug Tax Act imposed a steep tax on possession and storage of dangerous drugs. Several features of the tax made it appear intertwined with the state's traditional criminal laws: the tax was payable only after a taxpayer was arrested for a drug-related crime, the tax return was filled out by law enforcement authorities, and the tax res was confiscated and destroyed. These features conditioned liability for the tax on the commission of a crime.

1995 Op. Ky. Att'y Gen. 13 (discussing Kurth Ranch, 511 U.S. at 770-71, 114 S.Ct. at 1941-42, 128 L.Ed.2d at 773-74). The United States Supreme Court found that imposition of Montana's drug tax did violate double jeopardy prohibitions because it punished conduct that had already been punished by Montana's traditional criminal drug laws.

In reaching this conclusion, the Court set forth several factors, none of which is dispositive, which courts may use to determine whether a tax has crossed the line from an exaction to a punishment:

- A high rate of taxation
- An obvious deterrent purpose
- The tax is conditioned on the commission of a crime
- The tax is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place
- The tax is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed

Kurth Ranch, 511 U.S. at 780-84, 114 S.Ct. at 1946-48, 128 L.Ed.2d at 779-81.

Based on the above criteria, the United States Supreme Court found imposition of the Montana drug tax to be the "functional equivalent" of successive criminal prosecution. Id. at 784, 1948, 781. The tax rate was excessive (up to eight times the market value of the drugs seized), which indicated the Montana Legislature's intent to deter people from possessing the drugs. Id. at 780, 1946, 779. What was more important, however, was the fact that the tax was conditioned on the commission of a crime. Montana's Department of Revenue did not levy the tax until after a taxpayer's arrest. There was no opportunity for a taxpayer to pay the tax beforehand. Id. at 781-82, 1947, 779-80. Finally, because law enforcement officers seized the drugs and destroyed them before the tax was levied, the tax - purportedly a property tax - was assessed on goods which the taxpayer did not even own or possess. Id. at 783, 1948, 780-81. Thus, the Court concluded that Montana's tax was "too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." Id.

In light of Kurth Ranch, it is clear that a state may impose a drug tax only if it is levied on conduct not already punished as a crime. This is precisely what the Kentucky drug tax does: it taxes conduct not previously punished as a crime. Kentucky's Controlled Substances Excise Tax provides for anonymous tax payment, which is due "immediately upon the occurrence of taxable activity,"[5] and precludes the use of tax information in criminal prosecutions. KRS 138.886 (1,3). Once the tax has been paid, the Revenue Cabinet issues a tax stamp which is good for one year and must be affixed to the illegal drugs. KRS 138.874. If law

enforcement officers arrest a taxpayer and seize the taxpayer's drugs, the officers must report the seizure to the Revenue Cabinet if they do not see tax stamps on the confiscated drugs. KRS 138.880. The Revenue Cabinet then levies the tax and the taxpayer must file a return.

We find that Kentucky's drug tax is valid because it does not contain enough of the Kurth Ranch features to cross the line from an exaction to a punishment. Although part of the purpose of the tax is to deter drug dealing, its larger remedial purpose is to raise revenue to reimburse the Commonwealth for drug education, prevention, treatment and law enforcement. 1994 Ky. Acts ch. 315. The tax rate of two times the estimated market value of the controlled substance is not excessive. The United States Supreme Court has permitted much higher taxes to withstand constitutional scrutiny. See, e.g., United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed. 47 (1950) (sustaining the $100-per-ounce federal tax on marijuana) (cited in Kurth Ranch, 511 U.S. at 781, 114 S.Ct. at 1947, 128 L.Ed.2d at 779). Moreover, Kentucky law permits any harmful activity "to be taxed so high as to prohibit its being carried on except at a financial loss[,] thus taxing it out of business." Peel v. Dummit, Ky., 214 S.W.2d 605, 607 (1948).

In addition, under Kentucky's statutes, assessment and payment of the drug tax is not contingent on the commission of a crime. The tax is levied regardless of whether the taxpayer has been arrested for criminal conduct since taxes are due immediately upon the occurrence of the taxable activity. KRS 138.874. Accordingly, the tax is not levied on confiscated property; rather, it is excise tax levied upon a taxable activity: dealing in illegal drugs. KRS 138.872.

But even if assessment and payment of Kentucky's drug tax were more like a criminal punishment than a tax, there still would

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"Taxable activity" includes "producing, cultivating, manufacturing, importing, transporting, distributing, acquiring, purchasing, storing, selling, using, or otherwise possessing more than five (5) marijuana plants with foliation, 42.5 grams of marijuana which has been detached from the plant on which it grew, seven (7) grams of any controlled substance, or fifty (50) or more dosage units of any controlled substance, or fifty (50) or more dosage units of any controlled substance which is note [sic] sold by weight." KRS 138.871(4).

be no double jeopardy violation because there is not identity of offenses. A single course of conduct establishes more than one offense if the conduct violates two distinct statutes and if each statute requires proof of an element that the other does not. Commonwealth v. Burge, Ky., 947 S.W.2d 805, 811 (1996) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)). Kentucky's trafficking statute has a scienter requirement and imposes liability for trafficking in any amount of a controlled substance.[6] The drug tax, however, has no scienter requirement and is only levied if the taxpayer possesses at least seven grams of a controlled substance or 50 dosage units.[7] Therefore, one could be arrested and convicted of trafficking in a controlled substance, yet not be assessed a drug tax.

As the Attorney General of Kentucky noted in its 1995 opinion:

> The General Assembly has succeeded in establishing liability for the tax as a distinct and independent sphere of activity that is not connected in any material respect with a criminal prosecution. A person may be liable for the tax even if no prosecution is undertaken, or if a prosecution is unsuccessful. In fact, it is entirely possible for a person to obtain the stamps and pay the tax without heightening the risk of prosecution. For this reason, the holding in the Kurth Ranch case is totally inapplicable to the Kentucky tax.

1995 Op. Ky. Att'y Gen. 13. We agree and find that assessment and payment of the Kentucky Controlled Substances Tax does not bar subsequent criminal prosecution on federal and Kentucky double jeopardy grounds. The order of the Court of Appeals is reversed.

All concur.

6

KRS 218A.1412 states:
"A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance classified in Schedules I and II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; or phencyclidine."

7

See supra note 1.

APPENDIX B

Opinion of the Commonwealth of Kentucky
Court of Appeals, Rendered August 15, 1997.

Commonwealth of Kentucky, Appellant, v. Robert A. Bird and Joseph Nicholson, Appellees.

CASE NO. 96-CA-0666-MR

COMMONWEALTH OF KENTUCKY COURT OF APPEALS

August 15, 1997, Decided.

OPINION

AFFIRMING

BEFORE EMBERTON, HUDDLESTON, and MILLER, Judges. MILLER, JUDGE: The Commonwealth of Kentucky brings this appeal from a February 23, 1996, order of the Fayette Circuit Court. We affirm.

The facts are these: In July 1995, Robert A. Bird and Joseph Nicholson were arrested and charged with trafficking in a controlled substance in the first degree. Seized in the arrest were 9.8 grams of powder cocaine. Pursuant to the Kentucky Controlled Substances Excise Tax, codified as KRS 138.870-.990, Bird and Nicholson were assessed a tax upon the 9.8 grams. Consequently, Bird paid the Revenue Cabinet approximately $6,000.00, and Nicholson paid some $4,000.00. On November 27, 1995, the Fayette County Grand Jury indicted Bird and Nicholson for the offenses of trafficking in the controlled substance, first degree (Ky. Rev. Stat. (KRS) 218A.1412), and one count of possession of drug paraphernalia (KRS 218A.500). Bird was also charged with possession of marijuana (KRS 218A.1422).

Bird and Nicholson filed a motion to dismiss, claiming that count I of the indicted charged an offense for which they were

previously punished by payment of the tax. They argued that such multiple punishment constituted a violation of double jeopardy clause of the Fifth Amendment to the United States Constitution and Section 13 of the Kentucky Constitution. On February 23, 1996, the circuit court agreed and dismissed count I of the indictment. This appeal follows.

The Commonwealth contends the circuit court committed reversible error by dismissing count I of the indictment charging Bird and Nicholson with trafficking in a controlled substance, first degree. We disagree. We are persuaded by the reasoning of the Supreme Court of the United States in Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994), wherein the Court held that Montana's Dangerous Drug Tax Act violated the constitutional prohibition against successive punishments for the same offense. We believe the case sub judice sufficiently similar to Kurth Ranch to warrant reliance thereupon and, as such, are of the opinion that the circuit court did not commit reversible error by dismissing count I of the indictment against Bird and Nicholson.

No reasonable argument can be made that the Controlled Substance Excise Tax is promulgated to obtain revenue for the state; rather, its obvious purpose is to eliminate the proliferation of controlled substances. When the Commonwealth chooses to exact a heavy tax intended to restrict or abolish illegal or what it deems undesirable substances, the assessment is penal in nature and falls within the ambit of double jeopardy clauses of the state and federal constitutions. The Commonwealth is then compelled to act accordingly. It cannot impose double jeopardy punishment for "a single course of conduct." See Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and Jones v. Commonwealth, Ky., 756 S.W.2d 463 (1988); and KRS 505.020.

For the foregoing reasons, the order of the circuit court is affirmed.

HUDDLESTON, JUDGE, CONCURS IN RESULT ONLY.
EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTING: I respectfully dissent. I believe the majority mistakenly relies on Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S. Ct. 1937, 128 L. Ed.2d 767 (1994). Kurth does not stand for the proposition that all state statutes providing for assessment of taxes on those engaging in illegal drug activity violates the double jeopardy clause when both assessment and prosecution occur.

In Kurth, the Supreme Court, in a 5-4 opinion, held the Montana statute to be penal for reasons based only on certain provisions therein; provisions not found in the statute before us. Among others discussed, it points particularly to the provision that a taxpayer had no obligation to pay any tax unless and until he was arrested. Those characteristics found objectionable by the Kurth court being absent from the statute here, I would reverse the trial court and direct that it reinstate the indictments.

APPENDIX C

Opinion of the Fayette Circuit Court of Kentucky,
Rendered February 23, 1996.

Commonwealth of Kentucky, Plaintiff, v. Robert A. Bird
and Joseph Nicholson, Defendants.

CASE NO. 95-CR-1044

FAYETTE CIRCUIT COURT

February 23, 1996, Decided.

OPINION

JUDGE: JAMES E. KELLER

This matter is before the Court on the defendants' motion to dismiss on the grounds that they were previously assessed and thereafter paid a tax for the controlled substances on which Count 1 of the within indictment is based and a prosecution under Count 1, therefore, constitutes a violation of Double Jeopardy clause of the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution. We agree and sustain the defendants' motions.

KRS 138.870-.889 imposes a tax on the "selling, using, or otherwise possessing . . . of any controlled substance . . . ." Id. .870-.872.

In *Department of Revenue of Montana v. Kurth Ranch*, 128 L. Ed.2d 767 (1994), the Supreme Court considered for the first time whether a tax may be characterized as punitive and therefore violative of the constitutional prohibition against successive punishment for the same offense. The Court found the Montana tax offended the Double Jeopardu Clause. In so finding, the Court noted several factors that it considered in making the determination.

First, the Court noted the high rate of tax (eight times the market value) and the deterrent purpose of the tax. Id. 779. These

factors, in and of themselves, were not considered by the Court to be dispositive of whether the tax was punitive but "[lent} support to the characterization of the drug tax as punishment . . . ." Id. 779. The subject tax, including penalty and interest, is more than four times the market value, and the purpose of the tax is to deter drug trafficking.[8]

Next, it was noted that the "so-called tax" was conditioned on the commission of a crime which "is significant of penal and prohibitory intent rather than the gathering of revenue." Id. 779-80. Likewise, Kentucky's tax is not imposed upon a person lawfully engaged in selling or possessing of a controlled substance. KRS 138.872(3).

Finally, the Court noted that "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character." Id. 781. The defendants' controlled substances will ultimately be destroyed, KSR 218A.1404(2), and were never lawfully possessed by them. KRS 218A.230(1).

The Commonwealth concedes that the subject tax and this criminal prosecution are separate proceedings. Accordingly, we must find that the prosecution of the defendants under Count 1 of the indictment is prohibited by the Double Jeopardy clause.

ORDER

Count 1 of the indictment is hereby dismissed.

This matter is docketed for a status hearing at 8:30 a.m. on Friday, March 1, 1996.

Signed: JAMES E. KELLER
Judge

8

The sponsors of the legislation which enacted the tax explained that the "bill imposes a tax on marijuana and illegal drugs to take the profit out of drug trafficking." Minutes of the House Committee on Appropriations and Revenues, 1994 Regular Session, Meeting #8 (March 1, 1994) (House Bill 171).

APPENDIX D

KRS 218A.1412, in part, provides:

> (1) a person who is guilty of trafficking in a controlled substance in the first degree when he knowingly and lawfully trafficks in a controlled substance classified in Schedule I or II which is a narcotic drug; . . . .
>
> (2) any person who violates the provisions of subsection (1) of this section shall (a) for the first offense be guilty of a Class C felony.

APPENDIX E

KRS 138.870 provides:

> (3) "Dealer" means a person who engages in this state in a taxable activity as defined in subsection (4) of this subsection.

KRS 138.872, in part, provides:

> (1) A tax is hereby levied on each dealer engaged in a taxable activity in this State. The tax shall be paid at the following rates: . . .
>
> > (c) $200.00 on each gram, or portion thereof, of controlled substances; . . .
>
> (3) A dealer lawfully engaged in a taxable activity shall be exempt from the tax imposed by this section if the dealer is not in violation of any law which authorizes him to engage in the activity.

KRS 138.889 Penalties, provides:

> (1) Any dealer violating KRS 138.870 to 138.889 shall in addition to paying the tax imposed pursuant to KRS 138.872, pay a penalty equal to one hundred percent (100%) of the tax due . . .
>
> (2)(a) any dealer failing to affix the appropriate tax stamps, labels, or other tax indicia to any . . . controlled substance as required by KRS 138.874 is guilty of a Class C felony.

APPENDIX F

KRS 434.030 Fines for Felonies

> (1) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any felony shall, in addition to any other punishment imposed upon him, be sentenced to pay a fine in an amount of not less than one thousand dollars ($1,000.00) and not greater than ten thousand dollars ($10,000.00) or double his gain from commission of the offense, whichever is the greater.

KRS 532.010 Designation of Offenses

> (1) Any offense defined outside this code for which a law outside of this code provides a sentence to a term of imprisonment in a state penitentiary or reformatory for: . . . (b) at least five (5) but not more than ten (10) years shall be deemed a Class C felony; . . .

No. 98-1297

Supreme Court, U.S.
FILED
APR 28 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

JOSEPH NICHOLSON — PETITIONER

versus

COMMONWEALTH OF KENTUCKY
AND
ROBERT A. BIRD — RESPONDENTS

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the decision of the Kentucky Supreme Court in Commonwealth of Kentucky v. Bird, Ky., 979 S.W.2d 915 (1998) is in conflict with the decision of this Court in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994).

II. Whether the assessment of and payment by petitioner, Joseph Nicholson, of the Kentucky Controlled Substance Excise Tax bars subsequent criminal prosecution for possession or trafficking in the controlled substance on federal constitutional double jeopardy grounds.

III. Whether the double jeopardy analysis endorsed in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) should be expanded or limited.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; (2) Mr. Joseph Nicholson; and (3) Mr. Robert A. Bird. Mr. Bird has filed a separate certiorari petition in the United States Supreme Court, File No. 98-1331, to which the Commonwealth of Kentucky is filing a separate response.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

COUNTERSTATEMENT OF THE CASE 2

ARGUMENT 3

I. THE OPINION OF THE KENTUCKY SUPREME COURT IN COMMONWEALTH OF KENTUCKY V. BIRD, KY., 979 S.W.2D 915 (1998) IS NOT IN CONFLICT WITH THE OPINION OF THIS COURT IN MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994) 3

II. THE ASSESSMENT OF AND PAYMENT BY MR. NICHOLSON OF THE KENTUCKY CONTROLLED SUBSTANCES EXCISE TAX DOES NOT BAR A SUBSEQUENT CRIMINAL PROSECUTION FOR POSSESSION OR TRAFFICKING IN THE CONTROLLED SUBSTANCE ON FEDERAL CONSTITUTIONAL DOUBLE JEOPARDY GROUNDS 9

Payment of Kentucky's Controlled Substance Tax is not the Functional Equivalent of a Criminal Prosecution 10

Even if Kentucky's Tax is the Functional Equivalent of a Criminal Prosecution, There is no Identity of Offenses 16

III. MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994) SHOULD BE LIMITED TO ITS FACTS, ABROGATED OR OVERRULED 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES CITED:

Blockburger v. United States,
284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) 16

Commonwealth of Kentucky v. Bird, Ky.,
979 S.W.2d 915 (1998) ..... passim

Covelli v. Commissioner of Revenue Services,
668 A.2d 699 (Conn. 1995), vacated and remanded at
116 S.Ct. 2577, reaffirmed at 683 A.2d 737,
cert. den. at 137 L.Ed.2d 551 14-15

Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367,
4 L.Ed.2d 1435, 1448 (1960) 12

Hill v. State, 898 P.2d 155 (Okl. Cr. 1995) 15

Hudson v. United States,
522 U.S. , 118 S.Ct. , 139 L.Ed.2d 450 (1997) 10-12, 18

Kennedy v. Mendoza-Martinez,
372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) 11

Lynn v. West, 134 F.3d 582 (4th Cir. 1998) 15

McMullin v. South Carolina Department of Revenue and Taxation,
469 S.E.2d 600 (S.C. 1996) 15

Milner v. State, 658 S.2d 500 (Ala. 1994) 14

Montana Dept. of Revenue v. Kurth Ranch,
511 U.S. 767, 769, 114 S.Ct. 1937,
128 L.Ed.2d 767, 772-773 (1994) ..... passim

Padavich v. Thalacker, 162 F.3d 521 (8th Cir. 1998)
(cert. petition pending) 15

State v. Ballenger, 472 S.E.2d 572 (N.C. App. 1996), affirmed at 481 S.E.2d 84, cert. den. at 137 L.Ed.2d 551 15

State v. Jensen, 915 P.2d 109 (Kan. 1996) 15

State v. Gulledge, 896 P.2d 378 (Kan. 1995) 15

State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996) 15

State v. Sumpert, 554 N.W.2d 250 (Iowa 1996) 15

State v. Lange, 531 N.W.2d 108 (Iowa 1995) 15

United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549, 564 (1996) 4-5

United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed. 47 (1950) 14

Witte v. United States, 515 U.S. , 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995) 16

STATE STATUTES

KRS 138.174(1) 16

KRS 138.870(4) 5, 12, 13, 16, 17

KRS 138.874(1) 5, 13

KRS 138.886(1) and (2) 13

KRS 218A.1412 16

FEDERAL STATUTES CITED:

28 U.S.C. § 1257(a) 2

UNITED STATES CONSTITUTION CITED:

Fifth Amendment to the United States Constitution 2

No. 98-1297

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

JOSEPH NICHOLSON — PETITIONER

versus

COMMONWEALTH OF KENTUCKY
AND
ROBERT A. BIRD — RESPONDENTS

On Petition for Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT, COMMONWEALTH OF KENTUCKY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Comes the Commonwealth of Kentucky, by counsel, and pursuant to Order of this Court submits this brief in response to the petition for a writ of certiorari.

OPINIONS BELOW

Citations to the official and unofficial reports of the opinions below are adequately set forth at page 1 of the certiorari petition, as well as in the appendices referenced therein.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). The petition was timely filed.

CONSTITUTIONAL PROVISION INVOLVED

The petitioner asserts the double jeopardy clause of the Fifth Amendment to the United States Constitution as the constitutional provision involved. That clause states in relevant part as follows: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".

COUNTERSTATEMENT OF THE CASE

Kentucky does not quarrel with the facts as set forth in the petitioner's statement of the case. The petition correctly sets forth at page 3 the fact that Mr. Nicholson was taxed at a rate of $200 per gram of powdered cocaine. The petition incorrectly states at page 6, however, that the tax assessment was $400 per gram of controlled substance. Petitioner obtains this inflated figure by adding the late payment penalty to the $200 per gram assessment. A late payment penalty for the failure to timely pay a tax is an assessment separate from the tax assessment, itself.

ARGUMENT

I.

THE OPINION OF THE KENTUCKY SUPREME COURT IN COMMONWEALTH OF KENTUCKY V. BIRD, KY., 979 S.W.2D 915 (1998) IS NOT IN CONFLICT WITH THE OPINION OF THIS COURT IN MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994).

The specific issue addressed by this Court in its Kurth Ranch opinion was:

> . . . whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense.

Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 769, 114 S.Ct. 1937, 128 L.Ed.2d 767, 772-773 (1994). Conversely, the issue addressed by the Kentucky Supreme Court in Commonwealth v. Bird was, in relevant part:

> . . . whether a criminal defendant's payment of the Kentucky Controlled Substances Excise Tax (drug tax), KRS 138.870-.990, bars subsequent criminal prosecution on federal . . . double jeopardy grounds.

Commonwealth of Kentucky v. Bird, Ky., 979 S.W.2d 915 (1998). The Kurth Ranch opinion did not address "the question whether an ostensively civil proceeding that is [allegedly] designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character". Id., 511 U.S. 767, 781, 114 S.Ct. 1937, 128 L.Ed.2d 767, 780, at f.n. 21. The precise issue before the Kentucky Supreme Court in Commonwealth v. Bird was not addressed in the Kurth Ranch opinion.

Those anomalous features of the former Montana drug tax which were essential to the Kurth Ranch holding are not present in Kentucky's Controlled Substances Excise Tax Statutes (KRS 138.870-138.990). In United States v. Ursery, 518 U.S. 267, 116 S.Ct. 2135, 135 L.Ed.2d 549, 564 (1996), the United States Supreme Court summarized its Kurth Ranch holding as follows:

> In Department of Revenue of Montana v. Kurth Ranch, 511 U.S. ____, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994), we considered whether a state tax imposed on marijuana was invalid under the Double Jeopardy Clause when the taxpayer had already been criminally convicted of owning the marijuana which was taxed. We first established that the fact that Montana had labeled the civil sanction a 'tax' did not end our analysis. We then turned to consider

> whether the tax was so punitive as to constitute a punishment subject to the Double Jeopardy Clause. Several differences between the marijuana tax imposed by Montana and the typical revenue-raising tax were readily apparent. The Montana tax was unique in that it was conditioned on the commission of a crime and was imposed only after the taxpayer had been arrested: thus, only a person charged with a criminal offense was subject to the tax. We also noted that the taxpayer did not own or possess the taxed marijuana at the time that the tax was imposed. From these differences, we determined that the tax was motivated by a '"penal and prohibitory intent rather than the gathering of revenue.'" . . . Concluding that the Montana tax proceeding 'was the functional equivalent of a successive criminal prosecution.' we affirmed the Court of Appeals' judgment barring the tax . . .

(Emphasis added).

Kentucky's Controlled Substances Excise Tax does not subject only those charged with a criminal offense to taxation. The tax is due and payable regardless of whether one has been charged with a criminal offense. KRS 138.874(1); 138.870(4). Even though the activity taxed is illegal activity, not all such illegal activity is taxed. KRS 138.870(4). Unlike the former Montana tax, the Kentucky tax becomes due and payable at a time when the taxpayer has ownership or possession of the taxed controlled substance.

An excise tax such as Kentucky's, which is imposed as a matter of law the minute the taxpayer first owns or possesses the taxed substance, without regard to whether any criminal charges have been filed, does not implicate Kurth Ranch double jeopardy concerns. By contrast, the former Montana controlled substances tax was in the nature of a property tax. It was not imposed until the taxpayer was arrested on a criminal charge relating to the taxed substance. It was not assessed until after the taxpayer had been dispossessed of the taxed substance.

Kentucky's controlled substances tax was enacted into law as Chapter 315 of the 1994 Kentucky Acts, and subsequently was codified at KRS 138.870-138.990. Chapter 315 was titled "AN ACT relating to revenue and taxation". The preamble to that enactment, representing the collective voice of the Kentucky Legislature, sets forth a rational basis for the enactment of the revenue raising measure:

> WHEREAS, the General Assembly finds and declares that illegal drugs are damaging to the health, safety, and welfare of the citizens of the Commonwealth; and

> WHEREAS, the costs to the Commonwealth and its citizens resulting from the use of illegal drugs is substantial; and
>
> WHEREAS, dealers of illegal drugs in this state should be required to reimburse the Commonwealth for its cost associated with conducting drug abuse education, prevention, treatment, and law enforcement programs . . .

Secondarily, Chapter 315 of the 1994 Kentucky Acts might be characterized as a remedial measure. That characterization, however, would not necessarily implicate double jeopardy concerns. Precisely because "even remedial sanctions carry the sting of punishment", the question of whether a particular sanction constitutes punishment is not determined from a defendant's perspective. Kurth Ranch, supra, 511 U.S. 767, 777, 114 S.Ct. 1937, 128 L.Ed.2d 767, 777 (1994), at f.n. 14.

At pages 8-9 of the certiorari petition, the petitioner makes much of a phrase lifted from a Kentucky House of Representatives Committee Meeting in which the sponsors of Kentucky's Controlled Substances Excise Tax Bill explained that a purpose of the bill was "to take the profit out of drug trafficking". That statement is as consistent with an intent to remove the financial incentive to engage

in drug trafficking as it is with any intent to impose the functional equivalent of criminal punishment.

Liability under Kentucky's Controlled Substances Excise Tax will arise as a matter of law in most, if not all, cases before the individual engaged in taxable activity is arrested, charged with a criminal offense, and dispossessed of the controlled substances. (It, of course, is conceivable that the individual engaged in the taxable activity may never be detected, charged with a criminal offense, and dispossessed of the goods). If an individual timely pays the tax and is unable to pass the additional cost on to others, the only "punishment" he suffers as a result of payment is an inability to profitably engage in an illegal activity.

Those engaged in lawful businesses can, and do, pass taxes on to the consumer or others in the chain of distribution. One reason the result is different with respect to much of the activity taxed by Kentucky's Controlled Substances Excise Tax is that persons engaged in such activity do not generally operate openly and visibly, and hence are more readily capable of evading the tax. The Kentucky's

Controlled Substances Excise Tax, at least theoretically, is capable of being passed on through the chain of distribution.

A tax does not cease to be a tax merely because large numbers of taxpayers may dodge timely payment.

The opinion of the Kentucky Supreme Court in Commonwealth v. Bird does not conflict with the Kurth Ranch opinion.

II.

THE ASSESSMENT OF AND PAYMENT BY MR. NICHOLSON OF THE KENTUCKY CONTROLLED SUBSTANCES EXCISE TAX DOES NOT BAR A SUBSEQUENT CRIMINAL PROSECUTION FOR POSSESSION OR TRAFFICKING IN THE CONTROLLED SUBSTANCE ON FEDERAL CONSTITUTIONAL DOUBLE JEOPARDY GROUNDS.

To conclude that payment of Kentucky's controlled substances tax operates as a double jeopardy bar to a criminal prosecution for trafficking in the controlled substance, one must first conclude: (1) that the payment of the Kentucky controlled substance tax is the functional equivalent of a criminal prosecution; (2) that there is an identity of a tax "offense" and the criminal offense; and (3) that an

initial constitutional jeopardy bar attaches as the result of a tax which on its face subjects the taxpayer to neither loss of life or liberty.

Payment of Kentucky's Controlled Substance Tax is not the Functional Equivalent of a Criminal Prosecution.

The Court in Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) conceded that the Court had never before held that a tax violated the Double Jeopardy Clause. Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 778. The Kurth Ranch Court conceded that the unlawfulness of an activity does not prevent its taxation. Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 778. The Kurth Ranch Court ultimately concluded that Montana's drug tax "is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis". Id., 511 U.S. at 779, 114 S.Ct. at ____, 128 L.Ed.2d at 781.

In the recent case of Hudson v. United States, 522 U.S. ___, 118 S.Ct. ___, 139 L.Ed.2d 450 (1997), the United States Supreme Court noted that it had applied in Kurth Ranch a test similar to that set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9

L.Ed.2d 644 (1963). Hudson, supra, 139 L.Ed.2d at 461, fn. 6. The Hudson Court summarized the "guideposts" set forth in Kennedy for determining whether an ostensibly civil remedy is transformed into a criminal penalty as follows:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment--retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." Hudson, supra, 139 L.Ed.2d at 459.

The Hudson court further noted that the foregoing "factors must be considered in relation to the statute on its face", and that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty". Id., 139 L.Ed.2d at 459 (internal citations and internal quotation marks omitted).

The Kentucky statutes, duly enacted by the Kentucky Legislature, denominate Kentucky's controlled substances tax as a tax, not a criminal penalty.

With this in mind, we turn to the "guideposts" established in the Kennedy case, supra, and applied in the Hudson case, supra. Kentucky's tax does not involve an affirmative disability or restraint as those terms are "normally understood". Hudson, supra, 139 L.Ed.2d at 462. The tax is "certainly nothing approaching the 'infamous punishment' of imprisonment". Id., 139 L.Ed.2d at 462, quoting from Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435, 1448 (1960).

Taxes have not historically been regarded as a criminal punishment.

The Kentucky controlled substance tax contains no scienter requirement. KRS 138.870(4).

Admittedly, Kentucky's tax may serve a deterrent function, a traditional aim of punishment. The Kurth Ranch court noted, however, "neither a high rate of taxation nor an obvious deterrent purpose automatically marks...[a]... tax a form of punishment". Id.,

128 L.Ed.2d at 779. Indeed, a statute may serve a remedial purpose without constituting punishment for purposes of a double jeopardy analysis. See, e.g., Kurth Ranch, supra, 128 L.Ed.2d at 778, f.n. 16.

Admittedly, Kentucky's controlled substance tax applies to substances which it is not legal to possess, but the Kentucky controlled substance tax is due and payable regardless of whether the taxpayer has been charged with or convicted of a crime. KRS 138.870(4); 138.874(1). Moreover, the Kentucky statutes expressly provide for anonymous payment of the tax and further preclude the use of tax information in a criminal prosecution. KRS 138.874(1) and (2); KRS 138.886(1) and (2).

The Kentucky General Assembly has set forth a rational basis for establishing the tax. The preamble to the bill establishing Kentucky's controlled substances excise tax states:

> WHEREAS, the General Assembly finds and declares that illegal drugs are damaging to the health, safety, and welfare of the citizens of the Commonwealth; and
>
> WHEREAS, the costs to the Commonwealth and its citizens resulting from the use of illegal drugs is substantial; and

> WHEREAS, dealers of illegal drugs in this state should be required to reimburse the Commonwealth for its cost associated with conducting drug abuse education, prevention, treatment, and law enforcement programs . . .

Finally, the tax is not clearly excessive in relation to the purpose for the tax set forth in the preamble to Chapter 315 of the Kentucky Acts (1994). Indeed, the Kurth Ranch court acknowledged that the Court had sustained a "steep $100-per-ounce federal tax on marijuana in United States v. Sanchez, 340 U.S. 42, 71 S.Ct. 108, 95 L.Ed. 47 (1950)". Kurth Ranch, supra, 511 U.S. at 781, 114 S.Ct. at ____, 128 L.Ed.2d at 779.

Although there is a split among the state courts concerning the proper interpretation of the Kurth Ranch decision, a number of states which have considered the question have concluded that their controlled substances taxes do not implicate double jeopardy concerns under the Kurth Ranch holding. Those states are Alabama, Connecticut, Iowa, Kansas, North Carolina, Nebraska, Oklahoma and South Carolina. Milner v. State, 658 S.2d 500 (Ala. 1994); Covelli v. Commissioner of Revenue Services, 668 A.2d 699 (Conn. 1995), vacated and remanded at 116 S.Ct. 2577, reaffirmed at 683 A.2d 737,

cert. den. at 137 L.Ed.2d 551; State v. Sumpert, 554 N.W.2d 250 (Iowa 1996); State v. Lange, 531 N.W.2d 108 (Iowa 1995); State v. Gulledge, 896 P.2d 378 (Kan. 1995); State v. Jensen, 915 P.2d 109 (Kan. 1996); State v. Ballenger, 472 S.E.2d 572 (N.C.App. 1996), affirmed at 481 S.E.2d 84, cert. den. at 137 L.Ed.2d 551; [Contra, Lynn v. West, 134 F.3d 582 (4th Cir. 1998)]; State v. Stubblefield, 543 N.W.2d 743 (Neb. 1996); Hill v. State, 898 P.2d 155 (Okl. Cr. 1995); McMullin v. South Carolina Department of Revenue and Taxation, 469 S.E.2d 600 (S.C. 1996).

At least one federal circuit has issued an opinion consistent with the foregoing state cases. Padavich v. Thalacker, 162 F.3d 521 (8th Cir. 1998) (cert. petition pending).

A tax such as Kentucky's, which is imposed the minute the taxpayer first owns or possesses the taxed substance, without regard to whether any criminal charges have been filed, may fairly be said not to be the functional equivalent of a criminal prosecution. This is particularly true given the deference which customarily is accorded legislative bodies in legislative matters.

Even if Kentucky's Tax is the Functional Equivalent of a Criminal Prosecution, There is no Identity of Offenses.

There is no identity of offenses pursuant to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Blockburger analysis applies in both the multiple punishment and multiple prosecution contexts. Witte v. United States, 515 U.S. ___, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995).

Even if Kentucky's controlled substance tax statute were deemed to punish a criminal offense, it does not "punish" the same "offense" as the criminal statute (KRS 218A.1412) pursuant to which Mr. Bird and Mr. Nicholson were charged in the case at bar. Liability for the Kentucky controlled substances tax arose by operation of law prior to the arrest of Mr. Bird and Mr. Nicholson. KRS 138.174(1). Criminal liability under KRS 218A.1412 arose when Mr. Bird and Mr. Nicholson were arrested. The Kentucky controlled substances tax, unlike the criminal statute, contains no scienter requirement. KRS 138.870(4); KRS 218A.1412. KRS 218A.1412 imposes liability for trafficking in any amount of a controlled substance. Kentucky's controlled substances tax, however, requires proof of the producing,

cultivating, manufacturing, importing, transporting, distributing, acquiring, purchasing, storing, selling, using, or otherwise possessing at least seven grams of a controlled substance or fifty or more dosage units. KRS 138.870(4).

III.

MONTANA DEPT. OF REVENUE V. KURTH RANCH, 511 U.S. 767, 114 S.CT. 1937, 128 L.ED.2D 767 (1994) SHOULD BE LIMITED TO ITS FACTS, ABROGATED OR OVERRULED.

When jeopardy initially attaches in a criminal prosecution, then punishment imposed in an ostensibly civil proceeding which is the functional equivalent of a criminal prosecution may violate double jeopardy principles. Jeopardy clearly attaches initially in the criminal proceeding.

Undersigned counsel knows of no United States Supreme Court case or Kentucky Supreme Court case which has held that a civil proceeding which subjects an individual to neither loss of life or liberty nevertheless raises a jeopardy bar to a subsequent criminal prosecution because the civil proceeding is the "functional equivalent" of a criminal prosecution. If there is no initial jeopardy

under the federal or state constitutions, then there can be no double jeopardy.

No sound reasons exist for extending the Kurth Ranch holding beyond the facts of that case. As the United States Supreme Court recently noted in the Hudson case, supra, "[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational". Id., 139 L.Ed.2d at 461. As the Hudson court further noted:

> The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and non-punitive" penalties. Id., 139 L.Ed.2d at 461.

The Kurth Ranch opinion has been the subject of extensive litigation in state and federal courts. Should the Court grant certiorari review in the case at bar, the Court is requested to limit abrogate or overrule the Kurth Ranch double jeopardy analysis. Application of a double jeopardy analysis to tax enactments presents the same pitfalls as does application of a double jeopardy analysis to civil penalties.

CONCLUSION

WHEREFORE, certiorari review should be denied.

Respectfully submitted,

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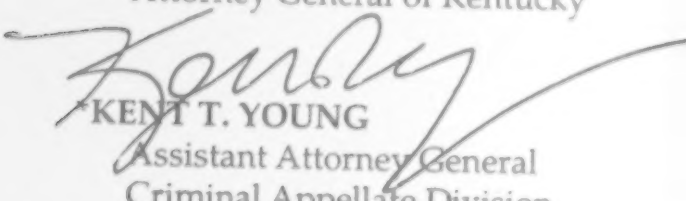

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